121 FERC ¶ 61,251
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Phelps Dodge Corporation
Phelps Dodge Energy Services, LLC
Phelps Dodge Power Marketing, LLC

Docket No. EC07-105-000

ORDER AUTHORIZING DISPOSITION AND ACQUISITION OF JURISDICTIONAL FACILITIES AND INTERPRETING FPA SECTION 203(a)(1)(A)

(Issued December 10, 2007)

1. On June 14, 2007, Phelps Dodge Corporation (Phelps Dodge) and its subsidiaries Phelps Dodge Energy Services, LLC (Phelps Services) and Phelps Dodge Power Marketing, LLC (Phelps Marketing) (collectively, Applicants), filed an application under section 203 of the Federal Power Act (FPA)[1] for a disclaimer of jurisdiction, or in the alternative, for authorization to transfer certain jurisdictional assets to Freeport McMoRan Copper & Gold Inc. (Freeport). Section 203 requires Commission authorization of a jurisdictional transaction prior to the transaction being consummated. In this case, the transaction closed on March 19, 2007, prior to the filing of Phelps Dodge's application. Freeport bought all the equity of the parent company Phelps Dodge. The jurisdictional assets involved in the transaction are Phelps Services' and Phelps Marketing's market-based rate tariffs and power-supply agreements as well as certain generating facilities operated by Phelps Services.[2]

2. The Commission finds that it has jurisdiction over the transaction. However, for the reasons discussed below, we will not refer the matter to the Commission's Office of Enforcement (Enforcement) for possible sanctions for the Applicants' failure to obtain approval in advance of the transaction. We will prospectively approve the application under section 203.

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[1] 16 U.S.C. § 824b (2000), *amended by* Energy Policy Act of 2005, Pub. L. No. 109-58, § 1289, 119 Stat. 594, 982-83 (2005).

[2] Through lease agreements, Phelps Services can make wholesale sales at market-based rates, as described in greater detail below.

I. Background

A. Description of the Parties

1. Phelps Dodge

3. Phelps Dodge is a corporation and mining company that owns Phelps Services and Phelps Marketing as well as two retail utility companies, Morenci Water and Electric Company (Morenci) and Ajo Improvement Company (Ajo), located in Arizona. Phelps Dodge is an exempt holding company under the Public Utility Holding Company Act of 2005.[3]

2. Phelps Services

4. Phelps Services is a limited liability company and is owned by Phelps Dodge. It is a power marketer authorized to make wholesale sales of energy and capacity at market-based rates,[4] including sales to its affiliates, Morenci and Ajo. Under lease agreements, it operates certain generation facilities.

5. For example, Phelps Services operates generators used by Phelps Dodge to provide back-up power to mines in Morenci, Arizona, and Chino and Tyrone, New Mexico. Under its lease agreements, Phelps Services has an interest in approximately 282 megawatts (MW) of capacity for sales. Phelps Services has the exclusive right to operate those facilities and sell power at wholesale, subject to Phelps Dodge's right to use the facilities for its mining business.

6. In addition, Phelps Services has a one-third interest in the Luna Energy Facility (Luna Facility), a 570 MW gas-fired-power plant in Deming, New Mexico. Phelps Services has rights to approximately 190 MW of the capacity produced by the Luna Facility. Phelps Services also has a market-based rate power-purchase-sale agreement with another utility for the exchange of energy from the Luna Facility with that utility's generation. In total, Phelps Services has access to approximately 573 MW of capacity for wholesale sales at market-based rates.

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[3] Energy Policy Act of 2005, Pub. L. No. 109-58, §§ 1261, *et seq.*, 119 Stat. 594 (2005) (EPAct 2005).

[4] *Green Power Partners I LLC*, 88 FERC ¶ 61,005 (1999).

3. Phelps Marketing

7. Phelps Marketing is a limited-liability company owned by Phelps Dodge. A power marketer authorized by the Commission to sell energy and capacity at wholesale at market-based rates,[5] Phelps Marketing does not own, operate, or control any generation or jurisdictional transmission facilities. In addition, it does not make any retail sales, has no franchised service territory, and presently has no customers, power sales or jurisdictional assets other than its market-based rate tariff.

4. Morenci and Ajo

8. Morenci and Ajo are retail-utility companies owned by Phelps Dodge that provide bundled retail services under rates subject to the Arizona Corporation Commission's jurisdiction. Applicants state that Morenci and Ajo do not own, operate, or control any generation or jurisdictional transmission facilities.

5. Freeport

9. Freeport is a corporation that conducts its operations through certain subsidiaries. Applicants state that neither Freeport nor its affiliates own or operate any Commission-jurisdictional assets. They further state that Freeport was not a "public utility" or a "public utility holding company" in accordance with Commission regulations, and is not one after the transaction.

B. Transaction

10. Freeport acquired all the outstanding common shares of Phelps Dodge, creating a change in upstream ownership of Phelps Services and Phelps Marketing. Applicants contend that the transaction is not subject to the Commission's jurisdiction, but state that Freeport will not assert any control over Phelps Services, Phelps Marketing, or their Commission jurisdictional assets until the Commission approves the transaction. They further state that Freeport has no plans to change any of Phelps Services' or Phelps Marketing's operations if the transaction is approved. According to the Applicants, Phelps Dodge and Phelps Services will continue as legal entities and Phelps Services will continue to operate Commission jurisdictional facilities. Finally, the Applicants note that only four-tenths of a percent of the merged companies' total-asset value is attributed to Commission jurisdictional assets.

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[5] *Phelps Dodge Power Marketing, LLC*, Docket No. ER05-953-002 (Aug. 12, 2005) (unpublished letter order) (granting market-based rate authority to Phelps Dodge Power Marketing).

II. Notice of Filing

11. Notice of the filing was published in the *Federal Register*, 72 Fed. Reg. 35,456 (2007), with comments, protests or interventions due on or before July 5, 2007. None were received.

III. Discussion

A. Jurisdiction

12. Section 203 of the FPA provides:

> (a)(1) No public utility shall, without first having secured an order of the Commission authorizing it to do so –
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> > (A) sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of $10,000,000;
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> > (B) merge or consolidate, directly or indirectly, such facilities or any part thereof with those of any other person, by any means whatsoever;
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> > (C) purchase, acquire, or take any security with a value in excess of $10,000,000 of any other public utility; or
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> > (D) purchase, lease, or otherwise acquire an existing generation facility-
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> > > (i) that has a value in excess of $10,000,000; and
> > >
> > > (ii) that is used for interstate wholesale sales and over which the Commission has jurisdiction for ratemaking purposes.
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> (a)(2) No holding company in a holding company system that includes a transmitting utility or an electric utility shall purchase, acquire, or take any security with a value in excess of $10,000,000 of, or, by any means whatsoever, directly or indirectly, merge or consolidate with, a transmitting utility, an electric utility company, or a holding company in a holding company system that includes a transmitting utility, or an electric utility company, with a value in excess of $10,000,000 without first having secured an order of the Commission authorizing it to do so.

13. The Applicants maintain that Commission approval under section 203 was not required for the transaction. They argue that section 203(a)(1)(A), which states that a public utility must obtain Commission authorization to "sell, lease, or otherwise dispose of" jurisdictional facilities, does not apply because the transaction is an *indirect* transfer of control of jurisdictional facilities through the upstream change in ownership of Phelps

Dodge.[6] They point out that, in contrast, section 203(a)(1)(B) requires Commission authorization for a public utility to "merge or consolidate, *directly or indirectly*" its jurisdictional facilities with those of any other person.[7] Relying on *Goldman Sachs,*[8] the Applicants argue that the presence of the modifier "directly or indirectly" in section 203(a)(1)(B) and its absence in section 203(a)(1)(A) means that section 203(a)(1)(A) does not apply to indirect transactions.

14. The Applicants also argue that section 203(a)(1)(B) is itself inapplicable because neither Phelps Dodge nor Freeport is a public utility, so the transaction could not have merged any jurisdictional facilities, since Freeport owned none. They further contend that sections 203(a)(1)(C)-(D) do not apply since Freeport is not a public utility. Similarly, they argue that section 203(a)(2) is inapplicable because Freeport was not a holding company when it acquired the upstream-ownership interest in Phelps Dodge.

15. While we agree that sections 203(a)(1)(B)-(D) and section 203(a)(2) do not apply to this transaction, we reject the Applicants' argument that the Commission lacks jurisdiction over the transaction under section 203(a)(1)(A). The transaction effectively disposed of Phelps Services' jurisdictional facilities through an indirect transfer of control over those facilities to Freeport.[9] As discussed below, we interpret such indirect transfers of control to fall within the "or otherwise dispose" language of section 203(a)(1)(A).

16. The Commission has long held that it will disregard appearances (corporate form) and treat a parent and its subsidiary as one in order to determine whether a proposed transaction would frustrate section 203's mandate. In particular, Freeport's purchase of Phelps Dodge resembles the transaction in *NorAm*, where the parent company (NorAm Energy) was not a public utility, but owned the public utility NorAm Services. NorAm Energy proposed to merge with Houston Industries, which was also not a public utility.

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[6] Applicants note that Phelps Dodge is not a public utility and that Phelps Services, while a public utility, did not *directly* sell, lease or dispose of any of its jurisdictional facilities.

[7] 16 U.S.C. § 824b(a)(1)(B) (2000), *amended by* EPAct 2005 (emphasis added).

[8] *Goldman Sachs Group, Inc*., 114 FERC ¶ 61,118 (2006) (*Goldman Sachs*).

[9] *See Enova Corp.*, 79 FERC ¶ 61,107 (*Enova*); *Morgan Stanley Capital Group, Inc*., 79 FERC ¶ 61,109 (*Morgan Stanley*); *NorAm Energy Services, Inc.*, 79 FERC ¶ 61,108 (1997) (*NorAm*).

NorAm Services argued that since neither NorAm Energy nor its merging partner was a public utility, the Commission did not have jurisdiction, just as Phelps Dodge argues here.

17. In finding that the *NorAm* transaction required approval under section 203, the Commission stated that the transaction was a disposition of NorAm's jurisdictional facilities through a transfer of control of those facilities from NorAm Energy to "new" Houston Industries and "new" NorAm.[10] We specifically rejected NorAm's argument that, because the merging parties were not themselves public utilities, section 203 did not apply. Instead, the Commission found that NorAm Energy and NorAm Services acted as one company and "effectively disposed" of jurisdictional facilities.[11] And just as NorAm Energy and NorAm Services acted as one company, so we find that Phelps Dodge and Phelps Services are acting as one company and transferring ultimate control of the jurisdictional facilities to the new parent company, Freeport.

18. While the Commission recognizes that some confusion may have been created by our holding in *Goldman Sachs*, cited by the Applicants, we view *Goldman Sachs* as inapposite. That case considered a new statutory provision added by EPAct 2005, section 203(a)(2). Nothing in EPAct 2005 or *Goldman Sachs* should be interpreted to undermine the pre-EPAct 2005 holdings under section 203(a)(1) in *Enova*, *Morgan Stanley* or *NorAm*.

19. Moreover, there are important differences between the language of sections 203(a)(1)(A) and 203(a)(2). In comparing section 203(a)(1)(A) ("sell, lease *or otherwise dispose"* (emphasis added)) with the first clause of section 203(a)(2) ("purchase, acquire or take any security"), it is clear that Congress chose to include in section 203(a)(1)(A) very broad language that it did not include in section 203(a)(2). While Congress could have included in section 203(a)(1)(A) the same "directly or indirectly" language it used with respect to the merge or consolidate clauses of both sections 203(a)(1)(B) and 203(a)(2), the rules of statutory construction require the Commission to give meaning to

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[10] The Commission issued *NorAm* concurrently with *Enova* and *Morgan Stanley*. Unlike *NorAm* (and the transaction in this case), *Enova* involved the merger of two exempt public utility holding companies. Nevertheless, both *NorAm* and *Morgan Stanley* rely on *Enova*'s textual and historical analysis of the basis for section 203 jurisdiction when parent companies of jurisdictional facilities change. All three cases focus on whether control over jurisdictional facilities is transferred, even indirectly.

[11] EPAct 2005 did not alter the provision at issue, including the term "or otherwise dispose of" in connection with public utilities and jurisdictional facilities. It merely repeated the same language that was contained in section 203 prior to EPAct 2005.

the "or otherwise dispose" language of section 203(a)(1)(A).[12] In contrast to section 203(a)(1)(A), the section 203(a)(2) language regarding acquisitions of securities by holding companies does not contain a similar broad phrase (such as "or otherwise obtain" any security). Accordingly, we continue to interpret section 203(a)(1)(A) to cover indirect actions, and we are not persuaded by the Applicants' argument that the Commission lacks jurisdiction over the transaction. We therefore address the Applicants' transaction pursuant to section 203, as described below.

20. Although the Applicants did not seek approval under section 203 before the transaction, as that section requires, we will not refer the matter to Enforcement to determine any appropriate sanctions or penalties for the Applicants' failure to obtain approval in advance of the transaction. We reach this determination based on two factors that have created confusion with respect to section 203 and our prior holdings regarding indirect dispositions of jurisdictional facilities. First, in EPAct 2005, Congress gave the Commission explicit jurisdiction over holding-company mergers, and the lack of such jurisdiction was a factor when the Commission adopted its interpretation of the "or otherwise dispose" language of section 203(a).[13] Second, we acknowledge that *Goldman Sachs*, which interpreted the new section 203(a)(2), may have created confusion regarding our jurisdiction over indirect actions under section 203(a)(1)(A).

21. Because we are now clarifying that section 203(a)(1)(A) continues to cover indirect transfers of control of jurisdictional facilities, however, our jurisdiction in this regard is no longer ambiguous. Accordingly, in any similar future cases, we will consider referring violations to Enforcement. We take such violations seriously, and we expect public utilities or other persons contemplating transactions involving jurisdictional facilities to come to the Commission for guidance before consummating the questionable transactions. They can seek such guidance by, for example, filing a request for a declaratory order. Our findings on the merits of the section 203 application are discussed below.

B. Section 203 Analysis

1. Standard of Review

22. Section 203(a)(4) requires the Commission to approve a transaction if it determines that the transaction will be consistent with the public interest. Under the Commission's regulations, its analysis of whether a transaction will be consistent with

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[12] *See, e.g.*, E. Crawford, The Construction of Statutes § 195, at 334 (1940) ("[M]ention of one thing implies exclusion of another thing").

[13] *See Enova*, 79 FERC ¶ 61,207 at 61,495.

the public interest generally involves considering three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation.[14] Section 203 also requires the Commission to find that the transaction "will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest."[15] The Commission's regulations establish verification and informational requirements for applicants that seek a determination that a transaction will not result in inappropriate cross-subsidization or pledge or encumbrance of utility assets.[16]

23. As a general matter, the circumstances that would affect our analysis of the effect of section 203 transactions could change, depending on the timing of the transaction, and possibly lead to different findings regarding the effect on rates and regulation and competition. Based on facts as asserted in the application and our understanding of the market conditions at the time of the acquisition, however, the Commission does not believe that the analysis of the competitive, rate or regulatory effects is materially different now than it would have been at the time the transaction was consummated. Therefore, we will analyze the transaction under present day circumstances. And as discussed further below, the Commission will prospectively authorize the transaction.[17]

2. Effect on Competition

24. Applicants state that the transaction does not result in any new combination of generating assets and will not result in any increase in concentration in the relevant

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[14] *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997) (Merger Policy Statement). *See also FPA Section 203 Supplemental Policy Statement*, 72 Fed. Reg. 42,277 (Aug. 2, 2007), FERC Stats. & Regs. ¶ 31,253 (2007). *See also Transactions Subject to FPA Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200 (2005), *order on reh'g*, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214, *order on reh'g*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006).

[15] 16 U.S.C. § 824b(a)(4) (2000), *amended by* EPAct 2005.

[16] 18 C.F.R. § 33.2 (2007).

[17] *See Northern Iowa Windpower II LLC*, 110 FERC ¶ 61,059, at P 8 (2005); *Katahdin Paper Co. and Great Northern Paper, Inc.*, 103 FERC ¶ 61,213, at 61,942 (2003).

market. They argue that the transaction raises no horizontal market power issues and note that Freeport owns no jurisdictional assets.

25. Applicants also state that the transaction raises no vertical market power concerns because neither they nor their affiliates own (or will own as a result of this transaction) gas production, transportation or storage facilities, or any other essential facilities for electric power production in the relevant geographic markets. In addition, Applicants state that neither they nor their affiliates own any electric transmission facilities that could be used to erect barriers to market entry by competing suppliers.

26. Based on the facts presented, we find that the transaction is not likely to adversely affect competition. Based on the limited nature of the jurisdictional facilities involved, we are satisfied that the transaction will not result in either horizontal or vertical market power.

3. Effect on Rates

27. Applicants state that the transaction does not raise the possibility of any adverse effect on the rates of existing customers because the only customer, El Paso, has a long-term service agreement for some of the capacity and output of Phelps Services' facilities. Applicants state that Phelps Services has committed the entire capacity and output of its generation facilities to wholesale customers under market-based rate schedules.

28. Based on these representations, we find that the transaction will have no adverse effect on rates.

4. Effect on Regulation

29. Applicants state that the transaction will have no adverse effect on regulation. They state that the transaction will not result in a change in the manner or the extent to which the Commission, any state, or any other federal agency regulates them.

30. Based on the facts presented in the application, the Commission finds that the transaction will not adversely affect regulation. We note that no state commission intervened.

5. Cross-Subsidization

31. Applicants state that the transaction will not result in the transfer of facilities between a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, and an associate company. They state that there will be no new issuances of securities by traditional public utility associate companies that have captive customers or that own or provide transmission service over jurisdictional transmission facilities, for the benefit of

an associate company. In addition, there will be no new pledges or encumbrances of assets of a traditional public utility associate company that has captive customers or that owns or provides transmission services over jurisdictional transmission facilities for the benefit of an associate company due to the transaction.[18] They also state that there will be no new affiliate contracts between a non-utility associate company and a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, other than non-power goods and services agreements subject to review under sections 205 and 206 of the FPA as a result of the transaction.

32. Applicants note that Freeport, Phelps Dodge and their affiliates and subsidiaries do not own, operate or control any traditional utility or any natural gas company in the United States. Accordingly, they argue that the transaction will not result in opportunities for cross-subsidization (either at the time of the transaction or in the future), and is consistent with the public interest.

33. We find that Applicants have provided adequate assurance that the transaction will not result in cross-subsidization of a non-utility associate company or pledge or encumbrance of utility assets for the benefit of an associate company.

The Commission orders:

(A) The proposed transaction is hereby approved as of the date of issuance of this order.

(B) The foregoing authorization is without prejudice to the authority of the Commission or any other regulatory body with respect to rates, service, accounts, valuation, estimates or determinations of costs, or any other matter whatsoever now pending or which may come before the Commission.

(C) Nothing in this order shall be construed to imply acquiescence in any estimate or determination of cost or any valuation of property claimed or asserted.

(D) The Commission retains authority under sections 203(b) and 309 of the FPA to issue supplemental orders as appropriate.

[18] *See* Exhibit M of application.

(E) Applicants shall make appropriate filings under section 205 of the FPA, as necessary, to implement the transaction.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.